

PRELIMINARY DRAFT—FOR DISCUSSION PURPOSES ONLY. THIS DRAFT IS NOT TO BE CONSIDERED A PROPOSED RULE AND IS ONLY PROVIDED FOR DISCUSSION PURPOSES TO DETERMINE WHAT TOPICS A LATER PROPOSED RULE MIGHT ADDRESS. UNDER NO CIRCUMSTANCES IS THIS DISCUSSION DRAFT TO BE USED TO DETERMINE TAX LIABILITY AND OR EXEMPTIONS.

This rule updates and incorporates the information contained in Rule 193 and 193C. It is anticipated that Rule 193C will be repealed in conjunction with the effective date of a revised Rule 193.

AMENDATORY SECTION (Amending WSR 91-24-020, filed 11/22/91, effective 1/1/92)

WAC 458-20-193 Inbound and outbound ((interstate)) sales of tangible personal property from or to persons in other states or foreign countries. (1) Introduction. ((This section explains Washington's B&O tax and retail sales tax applications to interstate sales of tangible personal property. It covers the outbound sales of goods originating in this state to persons outside this state and of inbound sales of goods originating outside this state to persons in this state. This section does not include import and export transactions.

(2) Definitions: For purposes of this section the following terms mean:

(a) "State of origin" means the state or place where a shipment of tangible personal property (goods) originates.

(b) "State of destination" means the state or place where the purchaser/consignee or its agent receives a shipment of goods.

(c) "Delivery" means the act of transferring possession of tangible personal property. It includes among others the transfer of goods from consignor to freight forwarder or for hire carrier, from freight forwarder to for hire carrier, one for hire carrier to another, or for hire carrier to consignee.

(d) "Receipt" or "received" means the purchaser or its agent first either taking physical possession of the goods or having dominion and control over them.

(e) "Agent" means a person authorized to receive goods with the power to inspect and accept or reject them.

(f) "Nexus" means the activity carried on by the seller in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington.

(3) Outbound sales. Washington state does not assess its taxes on sales of goods which originate in Washington if receipt of the goods occurs outside Washington.

(a) Where tangible personal property is located in Washington at the time of sale and is received by the purchaser or its agent in this state, or the purchaser or its agent exercises ownership over the goods inconsistent with the seller's continued dominion over the goods, the sale is subject to tax under the retailing or wholesaling classification. The tax applies even though the purchaser or its agent intends to and thereafter does transport or send the property out of state for use or resale there, or for use in conducting interstate or foreign commerce. It is immaterial that the contract of sale or contract to sell is negotiated and executed outside the state or that the purchaser resides outside the state.

(b) Where the seller delivers the goods to the purchaser who receives them at a point outside Washington neither retailing nor wholesaling business tax is applicable. This exemption applies even in cases where the shipment is arranged through a for hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or purchaser. It also applies

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whether the shipment is arranged on a "freight prepaid" or a "freight collect" basis. The shipment may be made by the seller's own transportation equipment or by a carrier for hire. For purposes of this section, a for hire carrier's signature does not constitute receipt upon obtaining the goods for shipment unless the carrier is acting as the purchaser's agent and has express written authority from the purchaser to accept or reject the goods with the right of inspection.

(4) Proof of exempt outbound sales.

(a) If either a for hire carrier or the seller itself carries the goods for receipt at a point outside Washington, the seller is required to retain in its records documentary proof of the sales and delivery transaction and that the purchaser in fact received the goods outside the state in order to prove the sale is tax exempt. Acceptable proofs, among others, will be:

(i) The contract or agreement of sale, if any, **And**

(ii) If shipped by a for hire carrier, a waybill, bill of lading or other contract of carriage indicating the seller has delivered the goods to the for hire carrier for transport to the purchaser or the purchaser's agent at a point outside the state with the seller shown on the contract of carriage as the consignor (or other designation of the person sending the goods) and the purchaser or its agent as consignee (or other designation of the person to whom the goods are being sent); or

(iii) If sent by the seller's own transportation equipment, a trip sheet signed by the person making delivery for the seller and showing:

The seller's name and address,

The purchaser's name and address,

The place of delivery, if different from purchaser's address,

The time of delivery to the purchaser together with the signature of the purchaser or its agent acknowledging receipt of the goods at the place designated outside the state of Washington.

(b) Delivery of the goods to a freight consolidator, freight forwarder or for hire carrier merely utilized to arrange for and/or transport the goods is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection. See also WAC 458-20-174, 458-20-175, 458-20-176, 458-20-177, 458-20-238 and 458-20-239 for certain statutory exemptions.

(5) Other B&O taxes -- outbound and inbound sales.

(a) **Extracting, manufacturing.** Persons engaged in these activities in Washington and who transfer or make delivery of such produced articles for receipt at points outside the state are subject to business tax under the extracting or manufacturing classification and are not subject to tax under the retailing or wholesaling classification. See also WAC 458-20-135 and 458-20-136. The activities taxed occur entirely within the state, are inherently local, and are conducted prior to the commercial journey. The tax is measured by the value of products as determined by the selling price in the case of articles on which the seller performs no further manufacturing after transfer out of Washington. It is immaterial that the value so determined includes an additional increment of value because the sale occurs outside the state. If the seller performs additional manufacturing on the article after transferring the article out of state, the value should be measured under the principles contained in WAC 458-20-112.

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~~(b) Extracting or processing for hire, printing and publishing, repair or alteration of property for others.~~ These activities when performed in Washington are also inherently local and the gross income or total charge for work performed is subject to business tax, since the operating incidence of the tax is upon the business activity performed in this state. No deduction is permitted even though the articles produced, imprinted, repaired or altered are delivered to persons outside the state. It is immaterial that the customers are located outside the state, that the work was negotiated or contracted for outside the state, or that the property was shipped in from outside the state for such work.

~~(c) Construction, repair.~~ Construction or repair of buildings or other structures, public road construction and similar contracts performed in this state are inherently local business activities subject to B&O tax in this state. This is so even though materials involved may have been delivered from outside this state or the contracts may have been negotiated outside this state. It is immaterial that the work may be performed in this state by foreign sellers who performed preliminary services outside this state.

~~(d) Renting or leasing of tangible personal property.~~ Lessors who rent or lease tangible personal property for use in this state are subject to B&O tax upon their gross proceeds from such rentals for periods of use in this state. Proration of tax liability based on the degree of use in Washington of leased property is required.

It is immaterial that possession of the property leased may have passed to the lessee outside the state or that the lease agreement may have been consummated outside the state. Lessors will not be subject to B&O tax if all of the following conditions are present:

(i) The equipment is not located in Washington at the time the lessee first takes possession of the leased property; and

(ii) The lessor has no reason to know that the equipment will be used by the lessee in Washington; and

(iii) The lease agreement does not require the lessee to notify the lessor of subsequent movement of the property into Washington and the lessor has no reason to know that the equipment may have been moved to Washington.

~~(6) Retail sales tax -- outbound sales.~~ The retail sales tax generally applies to all retail sales made within this state. The legal incidence of the tax is upon the purchaser, but the seller is obligated to collect and remit the tax to the state. The retail sales tax applies to all sales to consumers of goods located in the state when goods are received in Washington by the purchaser or its agent, irrespective of the fact that the purchaser may use the property elsewhere. However, as indicated in subsection (4)(b), delivery of the goods to a freight consolidator, freight forwarder or for hire carrier arranged either by the seller or the purchaser, merely utilized to arrange for and/or transport the goods out of state is not receipt of the goods by the purchaser or its agent in this state, unless the consolidator, forwarder or for hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.

(a) The retail sales tax does not apply when the seller delivers the goods to the purchaser who receives them at a point outside the state, or delivers the same to a for hire carrier consigned to the purchaser outside the state. This exemption applies even in cases where the shipment is arranged through a for hire carrier or freight consolidator or freight forwarder acting on behalf of either the seller or the purchaser. It also applies regardless of whether the shipment is arranged

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on a "freight prepaid" or a "freight collect" basis and regardless of who bears the risk of loss. The seller must retain proof of exemption as outlined in subsection (4), above.

(b) RCW 82.08.0273 provides an exemption from the retail sales tax to certain nonresidents of Washington for purchases of tangible personal property for use outside this state when the nonresident purchaser provides proper documentation to the seller. This statutory exemption is available only to residents of states and possessions or Province of Canada other than Washington when the jurisdiction does not impose a retail sales tax of three percent or more. These sales are subject to B&O tax.

(c) A statutory exemption (RCW 82.08.0269) is allowed for sales of goods for use in states, territories and possessions of the United States which are not contiguous to any other state (Alaska, Hawaii, etc.), but only when, as a necessary incident to the contract of sale, the seller delivers the property to the purchaser or its designated agent at the usual receiving terminal of the for hire carrier selected to transport the goods, under such circumstance that it is reasonably certain that the goods will be transported directly to a destination in such noncontiguous states, territories and possessions. As proof of exemption, the seller must retain the following as part of its sales records:

(i) A certification of the purchaser that the goods will not be used in the state of Washington and are intended for use in the specified noncontiguous state, territory or possession.

(ii) Written instructions signed by the purchaser directing delivery of the goods to a dock, depot, warehouse, airport or other receiving terminal for transportation of the goods to their place of ultimate use. Where the purchaser is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the purchaser when the circumstances are such that it is reasonably certain that the goods will be transported directly to their place of ultimate use.

(iii) A dock receipt, memorandum bill of lading, trip sheet, cargo manifest or other document evidencing actual delivery to such dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

(iv) The requirements of (i) and (ii) above may be complied with through the use of a blanket exemption certificate as follows:

Exemption Certificate

We hereby certify that all of the goods which we have purchased and which we will purchase from you will not be used in the State of Washington but are for use in the state, territory or possession of:

You are hereby directed to deliver all such goods to the following dock, depot, warehouse, freight consolidator, freight forwarder, transportation agency or other receiving terminal:

.....
.....

for the transportation of those goods to their place of ultimate use.

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~~This certificate shall be considered a part of each order that we have given you and which we may hereafter give to you, unless otherwise specified, and shall be valid until revoked by us in writing.~~

DATED

.....
(Purchaser)

By
(Officer or Purchaser's
Representative)

Address

~~(v) There is no business and occupation tax deduction of the gross proceeds of sales of goods for use in noncontiguous states unless the goods are received outside Washington.~~

~~(d) See WAC 458-20-173 for explanation of sales tax exemption in respect to charges for labor and materials in the repair, cleaning or altering of tangible personal property for nonresidents when the repaired property is delivered to the purchaser at an out-of-state point.~~

~~(7) **Inbound sales.** Washington does not assert B&O tax on sales of goods which originate outside this state unless the goods are received by the purchaser in this state and the seller has nexus. There must be both the receipt of the goods in Washington by the purchaser and the seller must have nexus for the B&O tax to apply to a particular sale. The B&O tax will not apply if one of these elements is missing.~~

~~(a) Delivery of the goods to a freight consolidator, freight forwarder or for-hire carrier located outside this state merely utilized to arrange for and/or transport the goods into this state is not receipt of the goods by the purchaser or its agent unless the consolidator, forwarder or for-hire carrier has express written authority to accept or reject the goods for the purchaser with the right of inspection.~~

~~(b) When the sales documents indicate the goods are to be shipped to a buyer in Washington, but the seller delivers the goods to the buyer at a location outside this state, the seller may use the proofs of exempt sales contained in subsection 4 to establish the fact of delivery outside Washington.~~

~~(c) If a seller carries on significant activity in this state and conducts no other business in the state except the business of making sales, this person has the distinct burden of establishing that the instate activities are not significantly associated in any way with the sales into this state. Once nexus has been established, it will continue throughout the statutory period of RCW 82.32.050 (up to five years), notwithstanding that the instate activity which created the nexus ceased. Persons taxable under the service B&O tax classification should refer to WAC 458-20-194. The following activities are examples of sufficient nexus in Washington for the B&O tax to apply:~~

~~(i) The goods are located in Washington at the time of sale and the goods are received by the customer or its agent in this state.~~

~~(ii) The seller has a branch office, local outlet or other place of business in this state which is utilized in any way, such as in receiving the order, franchise or credit investigation, or distribution of the goods.~~

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~~(iii) The order for the goods is solicited in this state by an agent or other representative of the seller.~~

~~(iv) The delivery of the goods is made by a local outlet or from a local stock of goods of the seller in this state.~~

~~(v) The out of state seller, either directly or by an agent or other representative, performs significant services in relation to establishment or maintenance of sales into the state, even though the seller may not have formal sales offices in Washington or the agent or representative may not be formally characterized as a "salesperson".~~

~~(vi) The out of state seller, either directly or by an agent or other representative in this state, installs its products in this state as a condition of the sale.~~

~~(8) **Retail sales tax -- inbound sales.** Persons engaged in selling activities in this state are required to be registered with the department of revenue. Sellers who are not required to be registered may voluntarily register for the collection and reporting of the use tax. The retail sales tax must be collected and reported in every case where the retailing B&O tax is due as outlined in subsection 7. If the seller is not required to collect retail sales tax on a particular sale because the transaction is disassociated from the in-state activity, it must collect the use tax from the buyer.~~

~~(9) **Use tax -- inbound sales.** The following sets forth the conditions under which out of state sellers are required to collect and remit the use tax on goods received by customers in this state. A seller is required to pay or collect and remit the tax imposed by chapter 82.12 RCW if within this state it directly or by any agent or other representative:~~

~~(i) Has or utilizes any office, distribution house, sales house, warehouse, service enterprise or other place of business; or~~

~~(ii) Maintains any inventory or stock of goods for sale; or~~

~~(iii) Regularly solicits orders whether or not such orders are accepted in this state; or~~

~~(iv) Regularly engages in the delivery of property in this state other than by for-hire carrier or U.S. mail; or~~

~~(v) Regularly engages in any activity in connection with the leasing or servicing of property located within this state.~~

~~(a) The use tax is imposed upon the use, including storage preparatory to use in this state, of all tangible personal property acquired for any use or consumption in this state unless specifically exempt by statute. The out of state seller may have nexus to require the collection of use tax without personal contact with the customer if the seller has an extensive, continuous, and intentional solicitation and exploitation of Washington's consumer market. (See WAC 458-20-221).~~

~~(b) Every person who engages in this state in the business of acting as an independent selling agent for unregistered principals, and who receives compensation by reason of sales of tangible personal property of such principals for use in this state, is required to collect the use tax from purchasers, and remit the same to the department of revenue, in the manner and to the extent set forth in WAC 458-20-221.~~

~~(10) **Examples -- outbound sales.** The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods~~

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originate in Washington (outbound sales). The examples presume the seller has retained the proper proof documents and that the seller did not manufacture the items being sold.

(a) Company A is located in Washington. It sells machine parts at retail and wholesale. Company B is located in California and it purchases machine parts from Company A. Company A carries the parts to California in its own vehicle to make delivery. It is immaterial whether the goods are received at either the purchaser's out-of-state location or at any other place outside Washington state. The sale is not subject to Washington's B&O tax or its retail sales tax because the buyer did not receive the goods in Washington. Washington treats the transaction as a tax exempt interstate sale. California may impose its taxing jurisdiction on this sale.

(b) Company A, above, ships the parts by a for hire carrier to Company B in California. Company B has not previously received the parts in Washington directly or through a receiving agent. It is immaterial whether the goods are received at either Company B's out-of-state location or any other place outside Washington state. It is immaterial whether the shipment is freight prepaid or freight collect. Again, Washington treats the transaction as an exempt interstate sale.

(c) Company B, above, has its employees or agents pick up the parts at Company A's Washington plant and transports them out of Washington. The sale is fully taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(d) Company B, above, hires a carrier to transport the parts from Washington. Company B authorizes the carrier, or another agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped out of Washington. This sale is taxable under Washington's B&O tax and, if the parts are not purchased for resale by Company B, Washington's retail sales tax also applies.

(e) Washington will not tax the transactions in the above examples (a) and (b) if Company A mails the parts to Company B rather than using its own vehicles or a for hire carrier for out-of-state receipt. By contrast, Washington will tax the transactions in the above examples (c) and (d) if for some reason Company B or its agent mails the parts to an out-of-state location after receiving them in Washington. The B&O tax applies to the latter two examples and if the parts are not purchased for resale by Company B then retail sales tax will also apply.

(f) Buyer C who is located in Alaska purchases parts for its own use in Alaska from Seller D who is located in Washington. Buyer C specifies to the seller that the parts are to be delivered to the water carrier at a dock in Seattle. The buyer has entered into a written contract for the carrier to inspect the parts at the Seattle dock. The sale is subject to the B&O tax because receipt took place in Washington. The retail sales tax does not apply because of the specific exemption at RCW 82.08.0269. This transaction would have been exempt of the B&O tax if the buyer had taken no action to receive the goods in Washington.

(11) Examples – inbound sales. The following examples show how the provisions of this section relating to interstate sales of tangible personal property will apply when the goods originate outside Washington (inbound sales). The examples presume the seller has retained the proper proof documents.

(a) Company A is located in California. It sells machine parts at retail and wholesale. Company B is located in Washington and it purchases machine parts for its own use from Company A. Company A uses its own vehicles to deliver the machine parts to its customers in

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Washington for receipt in this state. The sale is subject to the retail sales and B&O tax if the seller has nexus, or use tax if nexus is not present.

(b) Company A, above, ships the parts by a for hire carrier to Company B in Washington. The goods are not accepted by Company B until the goods arrive in Washington. The sale is subject to the retail sales or use tax and is also subject to the B&O tax if the seller has nexus in Washington. It is immaterial whether the shipment is freight prepaid or freight collect.

(c) Company B, above, has its employees or agents pick up the parts at Company A's California plant and transports them into Washington. Company A is not required to collect sales or use tax and is not liable for B&O tax on the sale of these parts. Company B is liable for payment of use tax at the time of first use of the parts in Washington.

(d) Company B, above, hires a carrier to transport the parts from California. Company B authorizes the carrier, or an agent, to inspect and accept the parts and, if necessary, to hold them temporarily for consolidation with other goods being shipped to Washington. The seller is not required to collect retail sales or use tax and is not liable for the B&O tax on these sales. Company B is subject to use tax on the first use of the parts in Washington.

(e) Company B, above, instructs Company A to deliver the machine parts to a freight consolidator selected by Company B. The freight consolidator does not have authority to receive the goods as agent for Company B. Receipt will not occur until the parts are received by Company B in Washington. Company A is required to collect retail sales or use tax and is liable for B&O tax if Company A has nexus for this sale. The mere delivery to a consolidator or for-hire carrier who is not acting as the buyer's receiving agent is not receipt by the buyer.

(f) Transactions in examples (11)(a) and (11)(b) will also be taxable if Company A mails the parts to Company B for receipt in Washington, rather than using its own vehicles or a for hire carrier. The tax will continue to apply even if Company B for some reason sends the parts to a location outside Washington after the parts were accepted in Washington.

(g) Company W with its main office in Ohio has one employee working from the employee's home located in Washington. The taxpayer has no offices, inventory, or other employees in Washington. The employee calls on potential customers to promote the company's products and to solicit sales. On June 30, 1990 the employee is terminated. After this date the company no longer has an employee or agent calling on customers in Washington or carries on any activities in Washington which is significantly associated with the seller's ability to establish or maintain a market for its products in Washington. Washington customers who had previously been contacted by the former employee continue to purchase the products by placing orders by mail or telephone directly with the out-of-state seller. The nexus which was established by the employee's presence in Washington will be presumed to continue through December 31, 1994 and subject to B&O tax. Nexus will cease on December 31, 1994 if the seller has not established any new nexus during this period. Company W may disassociate and exclude from B&O tax sales to new customers who had no contact with the former employee. The burden of proof to disassociate is on the seller.

(h) Company X is located in Ohio and has no office, employees, or other agents located in Washington or any other contact which would create nexus. Company X receives by mail an order from Company Y for parts which are to be shipped to a Washington location. Company X purchases the parts from Company Z who is located in Washington and requests that the parts be

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~~drop shipped to Company Y. Since Company X has no nexus in Washington, Company X is not subject to B&O tax or required to collect retail sales tax. Company X has not taken possession or dominion or control over the parts in Washington. Company Z may accept a resale certificate from Company X which will bear the registration number issued by the state of Ohio. Company Y is required to pay use tax on the value of the parts.~~

~~(i) Company ABC is located in Washington and purchases goods from Company XYZ located in Ohio. Upon receiving the order, Company XYZ ships the goods by a for-hire carrier to a public warehouse in Washington. The goods will be considered as having been received by Company ABC at the time Company ABC is entitled to receive a warehouse receipt for the goods. Company XYZ will be subject to the B&O tax at that time if it had nexus for this sale.~~

~~(j) P&S Department Stores has retail stores located in Washington, Oregon, and in several other states. John Doe goes to a P&S store in Portland, Oregon to purchase luggage. John Doe takes physical possession of the luggage at the store and elects to finance the purchase using a credit card issued to him by P&S. John Doe is a Washington resident and the credit card billings are sent to him at his Washington address. P&S does not have any responsibility for collection of retail sales or use tax on this transaction because receipt of the luggage by the customer occurred outside Washington.~~

~~(k) JET Company is located in the state of Kansas where it manufactures specialty parts. One of JET's customers is AIR who purchases these parts as components of the product which AIR assembles in Washington. AIR has an employee at the JET manufacturing site who reviews quality control of the product during fabrication. He also inspects the product and gives his approval for shipment to Washington. JET is not subject to B&O tax on the sales to AIR. AIR receives the parts in Kansas irrespective that JET may be shown as the shipper on bills of lading or that some parts eventually may be returned after shipment to Washington because of hidden defects.)) This rule explains the application of business and occupation (B&O) and retail sales taxes to interstate and international sales of tangible personal property. It covers both outbound sales of tangible personal property from this state to persons outside this state and inbound sales of tangible personal property from outside this state to persons in this state.~~

This rule contains a number of examples. The examples state a conclusion based on the specific facts presented. The examples should be used only as a general guide. The tax results of other situations must be determined after a review of all of the facts and circumstances.

(2) Related rules. Readers may also wish to refer to the following rules for additional information.

(a) WAC 458-20-103 (Time and place of sale). This rule provides general information about when and where a sale takes place.

(b) WAC 458-20-135 (Extracting natural products). This rule provides information about the taxability of persons who extract natural products, including persons who sell their extracted products in this state.

(c) WAC 458-20-136 (Manufacturing, processing for hire, fabricating). This rule provides information about the taxability of manufacturers, including manufacturers who sell their products in this state.

(d) WAC 458-20-145 (Local sales and use tax.) This rule provides information about determining the place of sale for purposes of sales and use taxes imposed by local governments.

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(e) WAC 458-20-173 (Installing, cleaning, repairing or otherwise altering or improving personal property of consumers). This rule includes information about the in-state repairing, cleaning, or altering of tangible personal property of nonresidents.

(f) WAC 458-20-174 (Sales of motor vehicles, trailers, and parts to motor carriers operating in interstate or foreign commerce). This rule explains the retail sales tax exemptions available for sales to for-hire motor carriers operating in interstate or foreign commerce.

(g) WAC 458-20-175 (Persons engaged in the business of operating as a private or common carrier by air, rail or water in interstate or foreign commerce). This rule provides information about the tax-reporting responsibilities of certain private or common carriers operating in interstate or foreign commerce.

(h) WAC 458-20-176 (Commercial deep sea fishing -- Commercial passenger fishing -- Diesel fuel). This rule provides information about the tax-reporting responsibilities of persons engaged in commercial fishing operations.

(i) WAC 458-20-177 (Sales of motor vehicles, campers, and trailers to nonresidents). This rule explains the tax treatment of sales of motor vehicles, campers, and trailers to persons who are not residents of this state.

(j) WAC 458-20-193D (Transportation, communication, public utility activities, or other services in interstate or foreign commerce). This rule explains the taxability of services that constitute interstate commerce and provides examples of exempt and taxable activities.

(k) WAC 458-20-194 (Doing business inside and outside the state). This rule provides information about the taxability of persons engaging in service business both inside and outside of Washington.

(l) WAC 458-20-211 (Leases or rentals of tangible personal property, bailments). This rule provides tax-reporting information for persons who lease or rent tangible personal property.

(m) WAC 458-20-238 (Sales of watercraft to nonresidents). This rule provides information about the taxability of sales of watercraft to persons who are not residents of this state.

(n) WAC 458-20-239 (Sales to nonresidents of farm machinery or implements, and related services). This rule provides information about the taxability of sales of farm machinery, implements, and related services to persons who are not residents of this state.

(o) WAC 458-20-243 (Litter tax). This rule provides information about the litter tax imposed on manufacturers, wholesalers, and retailers of certain products.

(p) WAC 458-20-246 (Sales to or through a direct seller's representative). This rule provides information about the B&O tax exemption provided by RCW 82.04.423 for persons who make sales in this state exclusively to or through a direct seller's representative.

(3) When do B&O and retail sales taxes apply to sales of tangible personal property? Washington imposes its B&O and retail sales taxes on sales of tangible personal property only if the property is delivered to the buyer or the buyer's representative in this state and the seller has nexus with Washington.

(a) **What is delivery?** "Delivery" is the transfer of possession of tangible personal property between the seller and the buyer or the buyer's representative. Delivery to an employee of a buyer is considered delivery to the buyer.

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When determining whether or where delivery occurs, it is immaterial where the contract of sale is negotiated or where the buyer obtains title to the property. Delivery terms and other provisions of the Uniform Commercial Code (Title 62A RCW) do not determine when or where delivery of tangible personal property occurs for purposes of Washington's B&O and retail sales taxes.

(i) **When does transfer of possession occur?** Transfer of possession of tangible personal property occurs when the buyer or the buyer's representative first takes physical control of the property or exercises dominion and control over the property.

"Dominion and control" means the right to put the property to the buyer's own purposes. A buyer does not exercise dominion and control over tangible personal property merely by arranging for shipment of the property from the seller to itself.

(ii) **Who is a buyer's representative?** A buyer's representative is a person, other than an employee of the buyer, who is authorized in writing by the buyer to receive tangible personal property and to make a final decision to accept or reject the property and who does exercise his or her authority to finally accept or reject the property.

(A) **What is a final decision to accept or reject property?** A final decision to accept or reject property means that the buyer's representative has accepted or rejected the property on behalf of the buyer, the seller has no further right to possession of the property, and the buyer has no right to return the property to the seller. If a seller and buyer have agreed in writing that final acceptance or rejection occurs in Washington despite a prior out-of-state acceptance by someone acting on behalf of the buyer, the sale takes place in Washington. For example, Company A in Oregon sells parts to Washington Company Z. The sales contract provides that Company Z may finally accept or reject the parts at its Washington facility. An employee of an affiliate of Company Z accepts the parts at a shipping terminal in Oregon and directs the parts to be shipped to Company Z in Washington. In this example, delivery occurs in Washington because the written sales contract provides that the buyer may finally accept or reject the parts at its Washington facility. Conversely, if a person acting on behalf of a buyer accepts delivery of property within Washington, but the buyer retains, in writing, the ability to finally accept or reject the property upon delivery at its out-of-state location, the sale takes place outside of Washington.

(B) **Is anyone prohibited from serving as a buyer's representative?** Neither a shipping company nor a seller can serve as a buyer's representative. For example, a seller located outside of Washington manufactures and sells parts to a Washington buyer. Employees of the seller, who are specifically approved by the buyer, inspect the parts for adherence to quality standards and then authorize their shipment to the buyer in Washington. Delivery does not occur at the taxpayer's out-of-state place of business.

(b) **Establishing that delivery occurred outside of Washington.** If the seller delivers property outside of Washington, the seller must retain documentary proof that the sale is not subject to tax. When the sales documents indicate that tangible personal property is to be shipped to a buyer in Washington but the seller delivers the property to the buyer at a location outside this state, the seller may use the following proof of out-of-state delivery to establish that delivery occurred outside of Washington.

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Acceptable proof of out-of-state delivery includes the written contract or agreement of sale, if any, and:

(i) If the property is shipped by a for-hire carrier, a waybill, bill of lading, or other contract of carriage indicating that the seller delivered the property to the for-hire carrier for transport to the buyer or the buyer's representative at a point outside the state. The seller must be shown on the contract of carriage as the consignor (or other designation of the person sending the property), and the buyer or buyer's representative as the consignee (or other designation of the person to whom the property is being sent);

(ii) If the property is sent by the seller's own transportation equipment, a trip-sheet signed by the person delivering the property showing:

(A) The seller's name and address;

(B) The buyer's name and address;

(C) The time and place of delivery; and

(D) The signature of the buyer or the buyer's representative acknowledging delivery at the designated place outside of Washington; and

(iii) If the property was received by a buyer's representative, documentation that the representative was authorized to accept or reject the property and did actually accept the property.

(c) **What is nexus?** Nexus is that minimum level of business activity or connection with the state of Washington that subjects the seller to the taxing jurisdiction of this state.

(i) **How long does nexus continue?** Once established, nexus continues for the remainder of the calendar year in which the nexus-creating activity ended and the following four calendar years.

(ii) **Examples of nexus-creating activities.** Any of the activities in (A) through (E) of this subsection (3)(c)(ii), standing alone, establishes sufficient nexus with Washington for the B&O and retail sales taxes to apply in cases where delivery of tangible personal property occurs in this state. These activities are not intended to be an exclusive list of examples of nexus-creating activities. Moreover, these activities are not intended to relieve any person of tax liability that would otherwise be allowed under the laws and constitutions of this state and of the United States.

(A) The property is delivered from an outlet of the seller in this state or from the seller's stock in this state.

(B) The seller has a branch office, outlet, or other place of business in this state.

(C) The seller solicits sales of its products in this state through the seller's own employees, or agents, independent contractors, or other representatives of the seller.

(D) The out-of-state seller, either directly or by an agent, independent contractor, or other representative in this state, installs its products in this state as a condition of the sale.

(E) The out-of-state seller, either directly or by an agent, independent contractor, or other representative, performs activities in this state that are significantly associated with the seller's establishment or maintenance of a market for sales into this state. It is immaterial that the seller does not have a formal sales office in Washington or the representative does not solicit sales in this state or is not formally characterized as a "salesperson."

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(iii) What if my activities in Washington are not related to my sales into this state?

Nexus is not determined on a transaction-by-transaction basis. If a person engages in activities within this state sufficient to establish nexus, the person is subject to B&O tax and the responsibility to collect retail sales tax, as applicable, for all of that person's sales of tangible personal property delivered in Washington. It is immaterial that the activities that establish nexus are not significantly associated in any way with a sale into this state.

(d) **B&O tax.** Where tangible personal property is delivered to the buyer or the buyer's representative in this state and the seller has nexus with Washington, the seller is subject to either retailing or wholesaling B&O tax on the sale. Persons making wholesale sales of tangible personal property in Washington must obtain properly completed resale certificates to document the wholesale nature of the sales. For additional information regarding resale certificates, refer to WAC 458-20-102 (Resale certificates).

B&O tax applies even if:

- The buyer or the buyer's representative intends to, and actually does, transport or send the property out of state for use or resale there, or for use in conducting interstate or foreign commerce;
- The contract of sale or contract to sell is negotiated and executed outside the state; or
- The purchaser resides outside the state.

Where the seller delivers tangible personal property to the buyer or the buyer's representative at a point outside Washington, the seller is not subject to B&O tax on the sale. The seller must retain proof of out-of-state delivery as described above in subsection (3)(b). If delivery occurs outside of Washington, the manner in which the property is delivered (e.g., for-hire carrier, freight consolidator, or freight forwarder acting on behalf of either the seller or purchaser), how payment for the shipping occurs (e.g., freight prepaid or freight collect), the nature of the shipment (e.g., seller's own vehicle or the vehicle of a for-hire carrier), or who bears the risk of loss are all immaterial.

(e) **Retail sales tax.** Unless specifically exempt by law, retail sales tax applies to all sales to consumers of tangible personal property when the property is delivered in Washington to the buyer or the buyer's representative and the seller has nexus with Washington. It is immaterial that the purchaser may use the property outside this state. The legal incidence of the tax is on the purchaser, but the seller is obligated to collect and remit the tax to the department.

Sales tax does not apply when the seller delivers the tangible personal property to the buyer or the buyer's representative at a point outside the state. The seller must retain proof of out-of-state delivery as described above in subsection (3)(b). If delivery occurs outside of Washington, the manner in which the property is delivered, how payment for the shipping occurs, the nature of the shipment, or who bears the risk of loss are all immaterial.

(i) **Exemption for residents of jurisdictions imposing a sales tax of less than three percent.** RCW 82.08.0273 provides a retail sales tax exemption to certain nonresidents of Washington for purchases of tangible personal property delivered to the purchaser in Washington for use outside this state. This exemption does not apply to the B&O tax. This exemption is available only to bona fide residents of states, United States possessions, or Canadian possessions or provinces, that do not impose a retail sales or use tax of three percent or more, or,

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if imposing a sales or use tax of at least three percent, permit Washington residents an exemption from the tax because of their residence.

This exemption does not apply to:

- Articles substantially used or consumed within Washington, such as prepared meals; or
- Retail services such as lodging, repair services, automobile towing, and laundry or dry cleaning services.

Sellers are not required to make tax-exempt sales to qualifying nonresidents. However, sellers choosing to make tax-exempt sales must ensure that all statutory requirements are met. Sellers who make sales without collecting retail sales tax are personally liable for the tax if a sale is made to a nonqualifying person or the proper documentation is not maintained. Taxpayers may obtain detailed information about this exemption by calling 1-800-647-7706, or by writing the department at:

Washington State Department of Revenue
Taxpayer Services Division
P. O. Box 47478
Olympia, WA 98504-7478

(ii) **Exemption for sales of property for use in a jurisdiction not contiguous to any other state.** RCW 82.08.0269 provides a retail sales tax exemption for sales of tangible personal property for use in states, territories, and possessions of the United States that are not contiguous to any other state (e.g., Alaska, Hawaii, etc.). This exemption does not apply to the B&O tax. This exemption is available only when, as a necessary incident to the contract of sale, the seller delivers the property to the buyer or the buyer's designated agent at the usual receiving terminal of the carrier selected to transport the property, under circumstances establishing that it is reasonably certain that the property will be transported directly to a destination in a noncontiguous state, territory, or possession.

As proof of exemption, the seller must retain the following information as part of its sales records:

- The buyer's certification that the property will not be used in the state of Washington and is intended for use in the specified noncontiguous state, territory, or possession;
- Written instructions signed by the buyer directing delivery of the property to a dock, depot, warehouse, airport, or other receiving terminal for transportation of the property to its place of ultimate use. Where the buyer is also the carrier, delivery may be to a warehouse receiving terminal or other facility maintained by the buyer when the circumstances establish that it is reasonably certain that the property will be transported directly to its place of ultimate use; and
- A dock receipt, memorandum bill of lading, trip sheet, cargo manifest, or other document showing actual delivery to the dock, depot, warehouse, freight consolidator or forwarder, or receiving terminal.

(4) **Drop shipments.** A drop shipment generally involves two separate sales. A person (the seller) contracts to sell tangible personal property to a customer. The seller then contracts to

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purchase that property from a supplier and instructs that supplier to deliver the property directly to the seller's customer. These sales are also known as third-party sales. If the customer is located in Washington, the customer is subject to retail sales or use tax unless specifically exempt by law or the customer provides the seller with a properly completed resale certificate to document the wholesale nature of the purchase. For detailed information regarding use tax, refer to WAC 458-20-178 (Use tax).

The following examples in this subsection illustrate the taxability of drop shipments. Unless otherwise noted, these examples assume that the tangible personal property is delivered to the customer in Washington.

(a) Where the seller and the supplier are located out of state and do not have nexus with Washington, and the customer is located in Washington, sales of tangible personal property by the seller to the customer and the supplier to the seller are not subject to B&O tax. In addition, neither the seller nor the supplier is required to collect retail sales tax on the sale. The customer, however, is liable for use tax and must remit the tax directly to the department unless specifically exempt by law or the property is purchased for resale.

If the seller has nexus with Washington but the supplier does not have nexus with Washington, the transactions are subject to tax as provided below in subsection (4)(b). If the supplier has nexus with Washington but the seller does not have nexus with Washington, the transactions are subject to tax as provided below in subsection (4)(c).

(b) Where the seller and customer are located in Washington, and the supplier is located out of state and does not have nexus with Washington, the supplier's sale of tangible personal property to the seller is not subject to B&O tax and the supplier is not required to collect retail sales tax on the sale. The sale by the seller to the customer is subject to wholesaling or retailing B&O tax as the case may be. The seller must collect retail sales tax from the customer unless specifically exempt by law or the customer provides the seller with a resale certificate to document the wholesale nature of the sale.

(c) Where the seller is located out of state and does not have nexus with Washington, and the customer and supplier are located in Washington, wholesaling B&O tax applies to the sale of tangible personal property by the supplier to the seller. The supplier has nexus with Washington, and the property was delivered in Washington. The supplier must obtain a properly completed resale certificate from the seller to document the wholesale nature of the sale. The registration number may be omitted from the resale certificate; however, the certificate should contain a statement that the items are being purchased for resale. See WAC 458-20-102. The sale from the seller to its Washington customer is not subject to B&O tax, and the seller is not required to collect retail sales tax on the sale. The customer is liable for use tax and must remit the tax directly to the department unless specifically exempt by law or the property is purchased for resale. If the seller in this example had nexus with Washington, the transactions would have been subject to tax as provided below in the next example.

(d) Where the seller and supplier have nexus with Washington and the customer is located in Washington, wholesaling B&O tax applies to the supplier's sale of tangible personal property to the seller where delivery of the property occurs in Washington, provided the seller furnishes the supplier with a properly completed resale certificate to document the wholesale nature of the sale. The sale from the seller to the customer is subject to wholesaling or retailing

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B&O tax as the case may be. The seller must collect retail sales tax from the customer unless the sale is specifically exempt by law or the customer provides the seller with a properly completed resale certificate.

(5) **Examples.** The following examples identify a number of facts and then state a conclusion regarding the application of B&O and retail sales taxes to sales of tangible personal property originating either inside or outside of Washington. For purposes of these examples, the reader should assume that the seller has retained the proper documentary proof when a sale is not subject to tax. Some of these examples indicate that a use tax liability is incurred. Readers should refer to WAC 458-20-178 for detailed information about use tax.

(a) Company A is located in Washington. It sells machine parts at retail and wholesale. Company B is located in California and buys machine parts from Company A. Company A carries the parts to California in its own vehicle to deliver them to Company B. The sale is not subject to B&O or retail sales taxes in this state because the parts were not delivered to the buyer in Washington.

(b) The facts are the same as in the previous example except that instead of shipping the parts itself, Company A delivers the parts by a common carrier to Company B in California. The sale is not subject to B&O or retail sales taxes in this state because the parts were not delivered to the buyer in Washington. It is immaterial whether the shipment is freight prepaid or freight collect.

(c) The facts are the same as in (a) of this subsection except that Company B has its employees pick up the parts at Company A's Washington plant and transport them out of Washington. As delivery of the property to the buyer occurred in Washington, the sale is subject to B&O tax. Retail sales tax also applies unless specifically exempt by law or Company B provides Company A with a properly completed resale certificate to document the wholesale nature of the sale.

(d) The facts are the same as in (a) of this subsection except that Company B instructs Company A to store the parts at Company A's Washington plant pending Company B's future disposition of the parts. Company A agrees to store the parts for Company B, and Company B insures the parts stored at Company A's Washington plant. Company A cannot sell the parts stored for Company B to anyone else. Because Company B exercised dominion and control of the goods in Washington, delivery of the parts to Company B occurred in Washington. The sale is subject to B&O tax. Retail sales tax also applies unless specifically exempt by law or Company B provides Company A with a properly completed resale certificate to document the wholesale nature of the sale.

(e) Washington will not tax the transactions in (a) and (b) of this subsection if Company A mails the parts to Company B rather than using its own vehicles or a common carrier for out-of-state delivery. By contrast, Washington will tax the transaction in (c) of this subsection if Company B's employees mail the parts to an out-of-state location after delivery to Company B occurs in Washington.

(f) Buyer C, who is located in Alaska, buys parts for its own use in Alaska from Seller D, who is located in Washington. Buyer C takes delivery of the parts at the dock in Seattle of the carrier selected to transport the parts to Alaska. The sale is subject to retailing B&O tax because Buyer C took delivery of the parts in Washington. The sale is exempt from retail sales tax under RCW 82.08.0269 if the documentation requirements of subsection (3)(e)(ii) are met.

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(g) Company A is located in California and has nexus with Washington. It sells machine parts at retail and wholesale. Company B is located in Washington and buys machine parts for its own use from Company A. Company A uses its own vehicles to deliver the parts to Company B in Washington. Company A is subject to the retailing B&O and retail sales taxes on this sale of parts to Company B. Company A has nexus with Washington, and delivery of the parts to Company B occurred in Washington.

(h) The facts are the same as in the previous example except that Company A transports the parts by a common carrier to Washington where Company B takes physical possession of the parts. The sale is subject to retailing B&O and retail sales taxes. If, however, Company A did not have nexus with Washington, the sale would not be subject to B&O tax, and Company A would not be required to collect retail sales tax on the sale. Company B, however, would be required to report and pay use tax to the department.

(i) The facts are the same as in (g) of this subsection except that Company B has its employees take possession of the parts at Company A's California plant for transport to Washington. Even if Company A has nexus with Washington, it is not required to collect Washington's retail sales or use tax and is not liable for B&O tax on the sale of these parts because delivery occurred in California. Company B is required to report and pay use tax to the department.

(j) The conclusions in the examples in (g) and (h) of this subsection are not affected if Company A mails the parts to Company B for delivery in Washington instead of using its own vehicles or a common carrier. The tax applies even if Company B for some reason sends the parts to a location outside Washington after the parts are delivered in Washington.

(k) Company X is located in Ohio and does not have nexus with Washington. Company X receives an order from Company Y, located in Washington, for parts that are to be shipped to Company Y in Washington for its own use as a consumer. Company X buys the parts from Company Z, which is also located in Washington, and requests that the parts be drop-shipped to Company Y. Since Company X has no nexus with Washington, Company X is not subject to B&O tax or required to collect retail sales tax on its sale to Company Y. The sale by Company Z to Company X is subject to B&O tax as Company Z has nexus with Washington and the parts are delivered in Washington. Company Z may accept a resale certificate from Company X with the registration number omitted to document the wholesale nature of the sale. Company Y is required to report and pay use tax to the department.

(l) A department store (Taxpayer) has retail stores located in Washington, Oregon, and in several other states. John Doe goes to Taxpayer's store in Portland, Oregon to purchase luggage. John Doe takes physical possession of the luggage at the store and elects to finance the purchase using a credit card issued to him by Taxpayer. John Doe is a Washington resident and the credit card billings are sent to him at his Washington address. Taxpayer is not liable for B&O tax and does not have any responsibility for collection of retail sales or use tax on this transaction because the purchaser, John Doe, took delivery of the luggage outside of Washington. John Doe is required to report and pay use tax to the department.

(m) The facts are the same as in the previous example except that Taxpayer ships the luggage to John Doe for delivery in Washington. Taxpayer owes Washington's retailing B&O

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tax and must collect Washington's retail sales tax on this sale. Taxpayer has nexus with Washington, and delivery of the luggage to John Doe occurred in Washington.

(6) Taxability of import and export sales of tangible personal property.

(a) **Generally.** The taxability of the sale of tangible personal property as provided in subsections (3), (4), and (5) is not affected if the property either originates in, or is delivered to, a foreign country. Retail sales tax and/or B&O tax applies to sales of tangible personal property that originate in foreign countries if the property is delivered to the buyer or the buyer's representative in this state and the seller has nexus. Retail sales tax and/or B&O tax do not apply to sales of tangible personal property that originate in Washington if the buyer or the buyer's representative takes delivery of the property in a foreign country.

(b) **Examples.** The following examples identify a number of facts and then state a conclusion regarding the application of B&O and retail sales taxes to sales of tangible personal property originating in, or delivered to, a foreign country. For purposes of these examples, all sellers of tangible personal property are assumed to have nexus with Washington unless otherwise noted, and, for nontaxable sales, the seller is assumed to have retained the proper documentary proof that the sale is not subject to tax.

(i) A foreign manufacturer sells tangible personal property to purchasers located outside the state of Washington. The property is transported from outside the United States by vessel in cargo containers to a port in Washington. When the property is unloaded from the vessel, it remains in the containers. The containers are loaded onto railcars for delivery to destinations outside the state of Washington. The B&O and retail sales taxes do not apply because the property is not delivered to the buyers in this state.

(ii) Taxpayer, located in Washington, sells tangible personal property at retail and wholesale. Buyer is located in a foreign country and buys items of tangible personal property from Taxpayer. The contract of sale is negotiated in Washington. Also, the document of title to the property is transferred by Taxpayer to Buyer in Washington. Taxpayer ships the property by a common carrier to Buyer in the foreign country. The sale is not subject to B&O or retail sales taxes in this state because the property is not delivered to the buyer in this state. It is immaterial where title to tangible personal property transfers or where a contract of sale is negotiated for purposes of determining whether or where delivery takes place.

(iii) An automobile manufacturer makes wholesale sales of vehicles to retailers located in Washington and throughout the United States. The vehicles are imported into the United States and received in a Foreign Trade Zone located in Western Washington. The vehicles are then delivered to the local and out-of-state retailers. The sales of vehicles delivered to Washington retailers are subject to wholesaling B&O tax, provided the manufacturer receives properly completed resale certificates from the retailers documenting the wholesale nature of the sales. The sales of vehicles delivered outside of Washington to the out-of-state retailers are not subject to B&O tax.

(iv) Taxpayer manufactures motor vehicles in Mexico for wholesale sale to automobile dealers, some of which are located in Washington. The vehicles are transported from Mexico to Texas on railcars. From Texas the vehicles are delivered by truck to the retail dealers. Title to the vehicles transfers to the dealers in Texas. The sales of vehicles delivered to the Washington dealers are subject to wholesaling B&O tax, provided Taxpayer receives properly completed

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resale certificates from the dealers to document the wholesale nature of the sales. Delivery of the vehicles occurred in Washington. It is immaterial where title to the vehicles transfers.

(v) Seller regularly sells chemicals to Buyer, located in Washington. The chemicals are delivered by rail to Buyer in Washington under an export rail rate. Seller and Buyer always intend that the chemicals will be resold to purchasers in foreign countries under supply contracts. In fact, the chemicals are always exported to foreign countries. The sale of chemicals by Seller to Buyer is subject to wholesaling B&O tax, provided that Seller receives a properly completed resale certificate from Buyer, because delivery of the chemicals occurs in Washington, and Seller has nexus with Washington. It is irrelevant that the chemicals are always subsequently exported by the purchaser.

(vi) Taxpayer, based in Washington, is a subsidiary of a corporation (Parent) that has nexus with Washington and is headquartered in a foreign country. Taxpayer makes retail sales of items of tangible personal property manufactured by Parent to a buyer in this state. Taxpayer purchases the items from Parent, and the property is transported from outside the United States to a customs house broker in Washington. The customs house broker prepares the documents necessary to clear the goods through customs and pays the necessary duties and processing fees on behalf of the importer of record. The customs house broker moves the property to its warehouse where the goods are entrusted to a local freight carrier for delivery to the buyer in this state. The sales by Parent to Taxpayer are subject to wholesaling B&O tax, provided Parent receives a properly completed resale certificate from Taxpayer, as delivery of the property occurs in Washington, and Parent has nexus with Washington. The sales by Taxpayer to the purchaser are subject to retailing B&O and retail sales taxes as delivery of the property occurs in Washington, and Taxpayer has nexus with Washington.